

United States
Circuit Court of Appeals
For the Ninth Circuit. /

FIRST PRESBYTERIAN CHURCH OF SANTA
BARBARA, CALIFORNIA, a religious corpo-
ration,

Appellant,
vs.

M. L. RABBITT, as Trustee in Bankruptcy of the
Bankrupt Estate of James Marwick, and
JAMES MARWICK,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United
States for the Southern District of California,

Central Division

FILED

JULY 24 1940

PAUL P. O'RRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States,
Southern District of California,
Central Division

No. 1428-H

M. L. RABBITT, as Trustee in Bankruptcy of the
Bankrupt Estate of James Marwick,
Plaintiff,

vs.

FIRST PRESBYTERIAN CHURCH OF SANTA
BARBARA, CALIFORNIA, a religious cor-
poration, and JAMES MARWICK,
Defendants.

BILL IN EQUITY

To the Honorable Judges of the United States Dis-
trict Court in and for the Southern District of
California, Central Division:

Plaintiff complains of defendants and each of
them and for a first cause of action alleges:

I.

That plaintiff now is and has been at all times
since the 16th day of May, 1938, the duly appointed,
qualified and acting Trustee of the bankrupt estate
of James Marwick, which said bankrupt estate is
now pending before the above entitled Court and is
number 28189-S in the records and files of the above
entitled Court. The said Marwick was duly adjudicated
a bankrupt on the 10th day of July, 1936, in

the said proceeding number 28189-S and at all times since the said adjudication of the said James Marwick the said bankruptcy matter has been pending and has at no time been closed.

Defendant, First Presbyterian Church of Santa Barbara, California is and has been at all times herein mentioned a non-profit corporation duly organized and existing under and by virtue of the laws of the State of California with its principal place of business and with its principal location at and in the County of Santa Barbara, State of California and within the above named judicial district. [2]

Defendant, James Marwick, is and has been at all times herein mentioned a resident of the County of Los Angeles, State of California and within the above named judicial district, and at all times hereafter the said James Marwick will be herein referred to as the bankrupt.

II.

There are two certain judgments which have been duly recovered and entered against the bankrupt as follows, to-wit:

A. Prior to the 21st day of September, 1932 an action was duly and regularly filed in the Superior Court of the State of California in and for the County of Los Angeles entitled Marie Scheinman, Plaintiff, vs. James Marwick and others, defendants, being number 344292 in the records and files

of the said Superior Court. Thereafter and on the 21st day of September, 1932 and in the said Superior Court action judgment was duly entered in favor of the said Marie Scheinman and against the bankrupt for the total sum of Fifty-seven Thousand One Hundred Twenty-eight and 17/100 (\$57,128.17) Dollars. The laws of the State of California provide that interest shall accrue on unsatisfied judgments at the rate of Seven (7%) per cent per annum, and there is, therefore, now due, owing and unpaid from the bankrupt to the said Marie Scheinman by virtue of the said judgment, the total sum or in excess of Fifty-seven Thousand One Hundred Twenty-eight and 17/100 (\$57,128.17) Dollars. The said complaint, filed as aforesaid by the said Marie Scheinman and the said judgment were based upon a certain promissory note executed in favor of the said Marie Scheinman by the bankrupt on the 1st day of December, 1927 in the principal sum of \$55,000.00 and the indebtedness evidenced by the said judgment has been due to the said Marie Scheinman from the bankrupt at all times since the said December 1st, 1927. No part of the said principal sum of Fifty-five Thousand (\$55,000.00) Dollars has ever been paid. The said Marie Scheinman has duly proved her claim based upon the said judgment in the said bankruptcy matter of James Marwick [3] within the time provided by law, and the said claim has been duly allowed.

B. Prior to the 26th day of February, 1936 the Assets Corporation, a corporation duly organ-

ized and existing under and by virtue of the laws of the State of California commenced an action in the Superior Court of the State of California in and for the County of Los Angeles entitled Assets Corporation, plaintiff vs. James Marwick, defendant, and being number 375933 in the records and files of the said Superior Court, and thereafter and on the 26th day of February, 1936 judgment was duly entered in the said Superior Court action in favor of the said Assets Corporation and against the bankrupt in the total sum of Fourteen Thousand Eight Hundred Fifty-three and 66/100 (\$14,853.66) Dollars. The said last mentioned Superior Court action and the said judgment in favor of the said Assets Corporation were based upon a promissory note in the sum of Forty-five Thousand (\$45,000.00) Dollars executed on or about August 14, 1928, by the bankrupt in favor of Security First National Bank of Los Angeles, which said promissory note was sold, assigned and transferred by the said Security First National Bank to the said Assets Corporation prior to the commencement of the said action in the said Superior Court. The promissory note dated August 14, 1928 was the renewal of an indebtedness theretofore existing in favor of the said Security First National Bank and against the bankrupt, which said indebtedness existed at all times since December 22, 1922. No part of the said judgment entered in the said Superior Court action in favor of the said Assets Corporation and against the bankrupt has ever been paid and there is now

due, owing and unpaid from the bankrupt to the said Assets Corporation in excess of the sum of Fourteen Thousand Eight Hundred Fifty-three and 66/100 (\$14,853.66) Dollars by reason of the said judgment. The said Assets Corporation has duly proved its claim in the said bankruptcy matter of James Marwick within the time provided [4] by law, and the said claim has been duly allowed.

III.

That for some time prior to November 28, 1927 and at all times subsequent thereto to and including on or about the 30th day of March, 1932 the said James Marwick was the owner of certain real property in the County of Santa Barbara, State of California, which said property is described as follows:

Beginning at the southeast corner of Lot 61, Santa Barbara Estates, as shown in Book 15, at pages 51 to 56 of Maps, records of Santa Barbara County; thence south $82^{\circ}25'$ west, 518.23 feet to a point on the easterly line of a road known as Cuervo Avenue, also known as Collado Avenue; thence easterly and northerly along said Cuervo Avenue, the following courses and distances: on a curve concave to the northwest, said curve having a delta of $25^{\circ}25'35''$, a radius of 63.67 feet, along the arc of said curve 28.26 feet to the end of curve; thence on a curve concave to the southeast, said curve having a delta of $48^{\circ}43'30''$ and radius of 12.85 feet, along arc of said curve 10.93 feet to the end of curve; thence on a curve concave to the east,

said curve having a delta of $15^{\circ}00'$, radius of 352.25 feet, along the arc of said curve 92.22 feet to the end of curve; thence along a curve concave to the west, said curve having a delta of $40^{\circ}30'$, radius of 136.35 feet, along the arc of said curve 96.38 feet to the end of curve; thence on a curve concave to east, said curve having a delta of $40^{\circ}00'$, radius 149.20 feet, along the arc of said curve 104.16 feet to the end of curve; thence on a curve concave to the northeast, said curve having a delta of $72^{\circ}00'$, radius of 89.58 feet, along the arc of said curve 112.57 feet to the end of curve; thence along a curve concave to the south, said curve having a delta of $31^{\circ}30'$, radius 303.22 feet; thence along the arc of said curve 166.70 feet to the end of the curve; thence along a curve concave to north, said curve having a delta of $53^{\circ}45'30''$, radius 65.76 feet, along the arc of said curve 61.70 feet to end of curve; thence [5] north $61^{\circ}44'30''$ east 197.56 feet to a point on the easterly line of Lot 67 of Hope Ranch Park Subdivision, as shown on the Map recorded in Book 2, at page 24, of Maps and Surveys, in the office of the County Recorder of said County; thence continuing along said course north $61^{\circ}44'30''$ east 145.51 feet to a point; thence north $32^{\circ}00'$ west 241.86 feet to a point on the easterly line of said Lot 67 as shown on said map recorded in Book 2, at page 24, of Maps and Surveys; thence along the easterly line of Lots 67 and 69, north 100.00 feet to the point of beginning. Being a part of Lots 67, 66 and 69 of Hope Ranch Park Subdivision according

to Map No. 1 recorded in Book 2, at page 24, of Maps and Surveys, in the office of the County Recorder of said County; and part of Lots 3 and 4, Subdivision of the Estate of Thomas Hope, deceased, as per Map filed in the Superior Court for Santa Barbara County in Case No. 1021, in the Matter of the Partition of the Estate of Thomas Hope, deceased. [6]

IV.

On or about the 30th day of March, 1932 the bankrupt made and caused to be recorded in the office of the County Recorder of the County of Santa Barbara, State of California a certain deed which said deed purported to convey the said real property from the bankrupt to the First Presbyterian Church of Santa Barbara, California. The said deed was recorded in book 259, page 305 of official records of the said County of Santa Barbara. By reason of the recording of the said deed defendant, First Presbyterian Church of Santa Barbara, California, now claims to be the owner and holder of the said real property and is now in possession thereof. The said transfer of the said real property from the bankrupt to defendant First Presbyterian Church of Santa Barbara, California as evidenced by the said deed was made and given by the bankrupt voluntarily and without a valuable or any consideration and was made by the bankrupt while he was insolvent and while he contemplated insolvency, and was made at a time when the bankrupt was indebted to the said Marie Scheinman and to

the predecessors in interest of the said Assets Corporation upon the obligations herein above described. Plaintiff is informed and believes and by reason of such information and belief alleges that at all times since January 1st, 1927 the bankrupt has been insolvent and that at all times since January 1st, 1927 the debts of the bankrupt have greatly exceeded the fair and reasonable value of the assets of the bankrupt.

V.

By reason of the facts herein alleged, the said transfer of the said real property from the bankrupt to defendant, First Presbyterian Church of Santa Barbara, California, was and is *frauduland* and void, and plaintiff as Trustee of the bankrupt estate of the bankrupt is the owner of, and is entitled to the possession of the said real property. [7]

VI.

By reason of the facts herein alleged plaintiff has no plain, speedy or adequate remedy at law.

For a second, separate and distinct cause of action against defendants, plaintiff complains and alleges:

I.

Repeats by reference thereto each and every allegation contained in Paragraphs I, II, III, IV, V and VI of plaintiff's first cause of action with the same force and effect as though each and all of said allegations were hereat set forth in full.

II.

Plaintiff is informed and believes and by reason of such information and belief alleges that the said transfer of the said real property as evidenced by the said deed was made and given by the bankrupt and received by defendant First Presbyterian Church of Santa Barbara, California for the purpose of and with the actual intent on the part of both of the said defendants to hinder, delay and defraud the creditors of the bankrupt.

For a third, separate and distinct cause of action against defendants, plaintiff complains and alleges:

I.

Repeats by reference thereto each and every allegation contained in Paragraphs I, II, III, IV, V and VI of plaintiff's first cause of action with the same force and effect as though each and all of said allegations were hereat set forth in full.

II.

As herein above alleged defendant First Presbyterian Church of Santa Barbara, California has been in possession of the said real property at all times since on or about March 30, 1932. Plaintiff is informed and believes and by reason of such information and belief alleges that the said defendant has collected and received substantial income or rentals from the said real property during the said period [8] of time to all of which said income and rentals plaintiff is entitled. Plaintiff has demanded

of defendant, First Presbyterian Church of Santa Barbara, California, that said defendant account to and pay over to plaintiff all such income and rentals received or derived from the said real property, but that the said defendant has failed and refused so to do. The said defendant has exclusive knowledge of the amounts of the incomes and rentals received aforesaid and plaintiff has no method of ascertaining the same except by an accounting from the said defendant.

Wherefore, plaintiff prays judgment of and from defendants and each of them as follows:

1. That the Court adjudge and decree that plaintiff, as Trustee of the bankrupt estate of James Marwick, is the owner of and is entitled to the possession of the real property herein above described.

2. That the Court adjudge and decree that the deed herein above described be declared by this Court to be void and of no force and effect, and that the Court adjudge that the said real property was the property of defendant James Marwick at all times prior to the commencement of this bankruptcy proceeding.

3. That the Court adjudge and decree that plaintiff is entitled to have and recover of and from defendant, First Presbyterian Church of Santa Barbara, California, all rents, issues and profits derived from said defendant during the time it has been in possession of the said real property, and that in this connection the Court order the said

defendant to account to plaintiff for the said rents, issues and profits.

4. And for such other and further relief as may be just and equitable and for general relief.
5. For plaintiff's costs in this action incurred.

EDWARD GALLAUDET
HUBERT LAUGHARN
SAMPSON MILLER
By EDWARD GALLAUDET
Attorneys for Plaintiff [9]

State of California,
County of Los Angeles—ss.

M. L. Rabbitt, being by me first duly sworn deposes and says: That he is the Plaintiff in the above entitled action; that he has read the foregoing Bill in Equity and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

M. L. RABBITT

Subscribed and sworn to before me this 22nd day of July, 1938.

[Seal] FLORENCE ROBINSON
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jul. 29, 1938. [10]

[Title of District Court and Cause.]

ANSWER OF FIRST PRESBYTERIAN
CHURCH OF SANTA BARBARA,
CALIFORNIA.

Comes now the above named defendant, First Presbyterian Church of Santa Barbara, California, a religious corporation, and in answer to plaintiff's bill of complaint on file herein denies, admits and alleges as follows, to-wit:

I.

Answering paragraph II of the first cause of action set forth in said complaint, said defendant alleges that it has no information or belief as to the allegations therein set forth, and upon such lack of information and belief denies said paragraph, the whole thereof and each and every allegation therein set forth.

II.

Answering paragraph III of the first cause of action set forth in said complaint, said defendant denies that the said James Marwick was the owner of said parcel of land described in [11] said complaint after the 28th day of November, 1927, and in this regard alleges that the said James Marwick, prior to the 28th day of November, 1927, made and entered into a certain subscription agreement by the terms of which he agreed to pay to the said answering defendant the sum of \$25,000.00 for the reconstruction of the house of worship of said answering defendant for and in consideration of the

promises of certain other members of said First Presbyterian Church of Santa Barbara, California, to pay to said First Presbyterian Church certain sums by them subscribed; that each and all said subscribing members of said church paid to said defendant the amount by them and each of them subscribed and that in reliance upon the said promise of the said James Marwick the said defendant expended upon the said reconstruction of said house of worship the total of all the sums so subscribed, including the said \$25,000.00 subscribed by the said James Marwick.

That thereafter, upon the said 28th day of November, 1927, the said James Marwick, to secure the payment of said promise by him made, to pay said sum of \$25,000.00 to said defendant, did make, execute and deliver to said defendant a certain deed of trust, a copy of which said deed of trust is hereto attached and made a part hereof as "Exhibit A"; that said deed of trust was duly recorded in Book 262, page 267, of the Official Records of the County of Santa Barbara, State of California, on the 24th day of March, 1932; that by the terms of said deed of trust said James Marwick did irrevocably transfer and assign said real property described in said paragraph III unto said defendant as security for the payment of said sum of \$25,000.00.

That said sum of \$25,000.00 has not, nor has any part thereof, been paid. [12]

III.

Answering paragraph IV of the first cause of action set forth in said complaint, said defendant admits that said James Marwick did transfer said real property to said defendant by deed and in this regard alleges said deed to be in words and figures as set forth in "Exhibit B", hereto attached and by this reference made a part hereof. Said defendant denies that said deed was given and said transfer made without adequate consideration and in this regard alleges that said deed and said transfer were given and made for a good, valuable, adequate and full consideration in full payment of said obligation evidenced by said subscription agreement and said deed of trust; said defendant has no information and/or belief as to the remaining allegations in said paragraph IV not specifically denied or admitted herein, and upon such lack of information and/or belief denies said remaining allegations.

IV.

Answering paragraph V of the first cause of action of said complaint, this answering defendant denies said paragraph, the whole thereof and each and every allegation therein contained.

V.

Answering paragraph VI of said first cause of action set forth in said complaint, this answering defendant denies said paragraph, the whole thereof and each and every allegation therein contained.

Answer to Second Cause of Action.

I.

Answering paragraph I of the second cause of action set forth in said complaint and paragraphs II, III, IV, V and VI of the first cause of action realleged in said first paragraph, this answering defendant realleges paragraphs I, II, III, IV and [13] V of its answer to the first cause of action in said complaint set forth as though here set forth in full.

II.

Answering paragraph II of the second cause of action set forth in said complaint, this answering defendant denies said paragraph, the whole thereof and each and every allegation therein contained.

Answer to Third Cause of Action.

Answering paragraph I of the third cause of action set forth in said complaint and paragraphs II, III, IV, V and VI of the first cause of action realleged in said first paragraph, this answering defendant realleges paragraphs I, II, III, IV and V of its answer to the first cause of action in said complaint set forth as though here set forth in full.

II.

Answering paragraph II of the third cause of action set forth in said complaint, this answering defendant denies said paragraph, the whole thereof and each and every allegation therein contained.

By way of a separate and distinct affirmative defense to said Bill of Complaint and to each and every cause of action therein set forth, said defendant alleges:

I.

That said complaint and each and every cause of action therein set forth is barred by the provisions of Subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California.

II.

That said complaint and each and every cause of action therein set forth is barred by the provisions of Section 318 of [14] the Code of Civil Procedure of the State of California.

III.

That said complaint and each and every cause of action therein set forth is barred by the provisions of Section 319 of the Code of Civil Procedure of the State of California.

By way of a second separate and distinct affirmative defense to said Bill of Complaint and to each and every cause of action therein set forth, said defendant alleges:

I.

That continuously and for a period of more than five years next preceding the filing of the above entitled action, said defendant has been in possession of said real property, adversely, under claim

of right, openly, notoriously and to the exclusion of the above named plaintiff and all other persons claiming an interest in said real property and has paid all taxes and assessments levied and/or assessed against said real property during said period.

By way of counter claim to plaintiff's said Bill of Complaint and to each and every cause of action therein set forth, said defendant alleges:

I.

That said defendant, since the said 28th day of November, 1927, has in good faith, paid taxes and assessments levied against said real property in the sum of \$392.77.

Wherefore, said defendant prays that said Bill of Complaint be dismissed and that said defendant be sent hence with its costs.

That said defendant, in the event that said deed be declared void and of no effect by the court, be declared to have a lien against said real property in the sum of \$392.77 taxes advanced and paid upon said property. [15]

For such further and additional general relief as is just in the premises.

SCHAUER, RYON & McMAHON,
Attorneys for defendant First
Presbyterian Church of Santa
Barbara, California.

By FRED H. SCHAUER.

State of California,
County of Santa Barbara—ss.

William G. Griffith, being by me first duly sworn, deposes and says: That he is an officer, to wit, President of the Board of Trustees of said answering defendant; that he has read the foregoing Answer of First Presbyterian Church of Santa Barbara, California, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

WILLIAM G. GRIFFITH.

Subscribed and sworn to before me this 30th day of September, 1938.

[Notarial Seal] MABEL REYNOLDS,
Notary Public in and for the County of Santa Barbara, State of California.

(For Exhibit "A" attached hereto see Defendants' Exhibit "B" in evidence.)

(For Exhibit "B" attached hereto see Plaintiff's Exhibit No. 2 in evidence.)

[Endorsed]: Filed Oct. 1, 1938. [16]

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS AND
MINUTE ORDER

Judge Hollzer's Calendar, Nov. 3, 1939.

This is a suit by the trustee of the estate in bankruptcy of defendant Marwick to set aside an alleged fraudulent conveyance. The complaint is in two counts.

The first is founded upon the theory that a certain deed given to the defendant Church by the co-defendant Marwick in 1932 was executed and delivered without a valuable consideration and while the grantor was insolvent, and hence was fraudulent and void as to existing creditors.

The second count is founded upon the contention that said conveyance was made with the actual intent to hinder and delay creditors and while the grantor was insolvent and therefore was fraudulent.

By their respective answers both the defendant Church and its co-defendant Marwick have alleged that said deed was delivered in payment of a previously made pledge on the part of Marwick, whereby he promised to pay \$25,000 for the reconstruction of the Church's house of worship in consideration of the promises of others to make contributions for the same purpose, also [17] that the latter paid their subscriptions, and that in reliance upon Marwick's promise the defendant Church expended upon the reconstruction of its house of worship the sums subscribed, including the amount subscribed by Marwick.

It was stipulated that a claim upon a judgment entered September 21, 1932 in favor of one Marie Scheinman for \$57,128.18, based upon a note given to her by Marwick under date of December 1, 1927, and also that a claim upon a deficiency judgment entered February 26, 1936 in favor of Assets Corporation for \$14,543.16, plus attorneys fees, based upon a note and trust deed given to it by Marwick under date of August 14, 1928, had been properly filed and allowed against the Marwick estate, and that neither of said judgments had been satisfied.

The evidence that Marwick made a promise of the character described in the answers is to be found in Defendants' Exhibit B, referred to as a Declaration or Deed of Trust, executed by the grantor in 1927. The latter instrument provides in part that Marwick holds the property in question "in trust for and as security for the payment of \$25,000" to the defendant Church and also that in the event of his death prior to paying said \$25,000 or in the event of his failure to pay the same within ten years from date, "then said First Presbyterian Church of Santa Barbara shall take record title to said property and be the sole owner thereof." Said instrument further provides that the maker had theretofore agreed to pay to said Church \$25,000 to be applied toward the reconstruction of its house of worship and the building of additions thereto, [18] that said agreement had been predicated upon Marwick being able to sell certain real property,

and that "said property has been sold but under terms and conditions which will not admit of the payment of said sum of \$25,000 in cash."

On the other hand, the testimony of George W. Wilson, a witness produced on behalf of the defendant Church was to the effect that in January of 1927, at a meeting of the congregation, the minister appeared on the platform with Marwick and announced that the latter had made a subscription of \$25,000 toward liquidating the Church's debt. Wilson further testified that upon said occasion he and a number of others, upon the strength of that subscription, made contributions, all of which together totalled the entire amount of the Church's debt.

In view of the recitals in said Declaration of Trust, the only reasonable conclusion to be reached from the evidence is that the promise given by Marwick was not of the character described by the witness Wilson, whose testimony was based upon his recollection of events occurring more than twelve years ago, but rather was a pledge of the kind mentioned in said Declaration of Trust. In this connection it should be noted that the latter promise is consistent, while the former is inconsistent, with the respective answers of the two defendants. This latter promise, however, was conditional, that is to say, the subscription was restricted to be applied toward the reconstruction of the Church's house of worship and the building of additions thereto. Furthermore, as disclosed by

said Declaration of Trust, the property involved herein [19] was not to be acquired by the defendant Church unless the promisor died prior to paying said subscription or failed to pay the same within ten years.

At the trial the defense conceded that no consideration was given for the conveyance herein sought to be declared in fraud of creditors, except that the Church cancelled the aforementioned subscription. In other words, there is no evidence that the defendant Church expended any money for the reconstruction of its house of worship or the building of additions thereto, or that anyone else promised to make a contribution for the same purpose and in reliance thereon.

The defense further admitted at the trial that in March, 1932, Marwick informed the defendant Church that he would not be able to perform the obligation he had assumed in said Declaration of Trust, and that because of his age and the fact that his money was exhausted he would be unable to make good his pledge; that he thereupon offered to give the Church a deed absolute to the property in question; also that at the same time he informed the defendant Church that he had other obligations to which said property might be subjected if the Church did not enforce its rights thereto; but that he did not disclose the nature of such other obligations; and that under these circumstances the Church accepted the deed in question.

In addition, by plaintiff's Exhibit 3, (being a photostatic copy of a letter written to said grantor by one of the Church's attorneys on the same day that said Declaration of Trust was recorded) the trustees of the Church notified said grantor: "They (the trustees) do [20] not like to take the property and are doing so solely because they believe you wish the church to have it and because their taking it will prevent it going into the hands of undeserving creditors * * *"

Thus it appears that the defendant Church accepted the conveyance of the property in question with the knowledge of the fact that Marwick was then indebted to certain creditors and that he was unable to pay such debts, and that by accepting said conveyance the Church would aid in preventing these creditors from collecting what was owing to them.

It is equally clear that the cancellation of Marwick's subscription of \$25,000 by the acceptance of the deed in March, 1932, did not constitute a consideration for such conveyance, since that pledge was not binding upon Marwick, the Church having expended no money in reliance thereon, and since no other binding pledge was made in reliance upon the same. Nor can there be any doubt that Marwick was insolvent when the said conveyance was made.

While in their answers both defendants have pleaded that each count was barred by the provisions of Sections 318 and 319 and also by the provisions of Subdivision 4 of Section 338 of the Cali-

fornia Code of Civil Procedure, the brief filed on behalf of the defense indicates that this contention has been partially abandoned, that is to say, that only Section 338, Subdivision 4 is now claimed to be applicable. As to the latter defense, the evidence shows without contradiction that the judgment creditor Mrs. Scheinman had no knowledge of the facts constituting the fraud until the year 1935. The recording of the conveyance in 1932 did not disclose that the same was without consideration, nor that Marwick was insolvent, nor [21] any of the other elements necessary to establish that the *the* transaction was fraudulent. Accordingly, the statute of limitations did not start to run until 1935.

Bankruptcy proceedings having been instituted on July 10, 1936, the time within which the trustee might commence this suit was extended to two years after the closing of the estate in bankruptcy. See Hansen v. California Bank, 61 Pacific (2d) 794, 803, and cases therein cited. The defense of the bar of the statute of limitations is, therefore, without merit.

There remains to be considered the question whether the Church is entitled to be reimbursed for the monies advanced in payment of taxes. As pointed out in the case of Lynch v Burt, 132 Fed, 417, 432: "That he who seeks equity must do equity is a controlling principle or maxim of universal application in awarding equitable remedies. Following it, adverse equities growing out of or closely connected with the subject matter of the

suit are protected by giving to a party the relief to which he is entitled only on condition that he accords to his adversary the corresponding right to which he also is entitled. This principle has a recognized application in suits by creditors to avoid or quiet title against fraudulent conveyances or transfers of a debtor's property, where, after the conveyance or transfer, taxes are paid or encumbrances discharged under circumstances which give rise to an equity equal or superior to that of creditors. If the grantee has been a conscious participant in the fraud, he is not, as against creditors, entitled to reimbursement for such expenditures. [22] (citing cases) * * * But if the grantee has not been a conscious participant in the fraud, he is entitled to reimbursement to be provided for in the decree. (citing cases)"

In *Blank v. Aronson*, 187 Fed. 241, where one of the questions involved was whether a fraudulent grantee was entitled to payment for improvements made by him, in the event of a decree setting aside the fraudulent conveyance, the court said (page 246): "The controlling fact in determining whether this should be done is whether the improvements were made by him in good faith, believing himself to be the real owner, or whether they were made by him in bad faith, in pursuance of a fraudulent scheme to circumvent the owner."

We are satisfied that the defendant Church believed itself to be the real owner of the property in question, and paid the taxes thereon in good

faith. Furthermore, it is not disputed that the property in question consisted of an unimproved parcel of land and that the Church derived no benefit therefrom. Hence the Church should be reimbursed in the amount of the taxes paid on this property. The latter right to relief can be adequately safe-guarded by making such sum a lien against said property.

Accordingly we hold that plaintiff is entitled to a decree as prayed for, subject to the equitable relief in favor of the Church as herein mentioned.

[Endorsed]: Filed Nov. 3, 1939. [23]

At a stated term, to wit: The September Term, A. D. 1939 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 3rd day of November in the year of our Lord one thousand nine hundred and thirty-nine.

Present:

The Honorable: H. A. Hollzer, District Judge.

[Title of Cause.]

For the reasons set forth in the Memorandum of Conclusions this day filed, it is ordered that counsel for plaintiff prepare and serve findings and decree in conformity with said memorandum. [24]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause came on regularly to be tried on the 20th day of June, 1939, before the above entitled Court, the Hon. Harry Hollzer, Judge presiding; the plaintiff, M. L. Rabbitt, being personally present and represented by his counsel, Edward Gallaudet, Hubert Laugharn and Sampson Miller, Edward Gallaudet, of counsel; the defendant, First Presbyterian Church of Santa Barbara, California, a religious corporation, being represented by its counsel, Schauer, Ryon & McMahon, Robert W. McIntyre of counsel; and the defendant, James Marwick having appeared by his counsel, Stick & Moerdyke, and the said counsel for the said defendant James Marwick having advised the Court that defendant Marwick desired no relief herein and sought to be excused, and the said Marwick and his said counsel having thereupon been excused and having taken no part in the said trial; and the said cause having been tried on the said 20th day of June, 1939 and having been continued to June 21, 1939, upon which said date the said trial was completed; and oral and documentary evidence having been introduced; and both parties having rested; and the cause having been submitted to the Court for its decision; and the Court having [25] made its Memorandum of Conclusions and Minute Order directing that plaintiff recover judgment as prayed for subject to equitable relief in favor of defendant,

First Presbyterian Church of Santa Barbara, California, as hereinafter more particularly stated, Now, Therefore, the Court hereby makes its findings of fact and conclusions of law as follows, to-wit:

Findings of Fact

I.

The allegations in paragraph I of plaintiff's Bill in Equity, not having been controverted, are found to be true.

II.

Each and every allegation contained in paragraph II of plaintiff's Bill in Equity is true.

III.

On and prior to March 26, 1932 defendant, James Marwick, was the owner of the real property described in plaintiff's Bill in Equity and hereinafter referred to as the said real property. On or about the said March 26, 1932 the said James Marwick made, executed and delivered to defendant, First Presbyterian Church of Santa Barbara, California, a deed to the said real property, a true and correct copy of which said deed is contained in the Answer of First Presbyterian Church of Santa Barbara, California, and described therein as Exhibit B.

IV.

At the time of the execution of the said deed, the said Marwick was insolvent and unable to pay his debts and defendant, First Presbyterian Church of Santa Barbara, California, had reason to believe that the said Marwick was insolvent. The said deed

was made and given voluntarily and without a valuable or any consideration and the said Marwick received no consideration [26] therefor from defendant, First Presbyterian Church of Santa Barbara, California.

V.

The said deed was made and given by the bankrupt and received by the First Presbyterian Church of Santa Barbara, California, with intent to hinder, delay and defraud the creditors of said Marwick.

VI.

It is not true, as alleged in paragraph II of plaintiff's Bill in Equity that defendant, First Presbyterian Church of Santa Barbara, California, has collected rents or profits from the said property.

VII.

The Court finds that defendant, First Presbyterian Church of Santa Barbara, California, has since the execution of the said deed, paid various amounts of money as taxes on the said real property, and that by virtue of said payments defendant, First Presbyterian Church of Santa Barbara, California, has become entitled to a lien on the said real property for the moneys so advanced, without interest.

VIII.

Except as the facts are otherwise herein above found, all of the allegations of plaintiff's Bill in Equity are true and all of the admissions, denials

and allegations of the answer of First Presbyterian Church of Santa Barbara, California relating to the said allegations, are untrue.

IX.

The first affirmative defense of defendant, First Presbyterian Church of Santa Barbara, California is untrue and the Court finds that plaintiff's cause of action is not barred by the provisions of subdivision 4 of Section 338 or by the provisions of Section 318 or 319 of the Code of Civil Procedure of [27] the State of California.

X.

The allegations of the second affirmative defense of defendant, First Presbyterian Church of Santa Barbara, California, are untrue and the Court finds that said defendant has not been in adverse possession of the said property as alleged in said affirmative defense.

XI.

The Court finds that the counterclaim of defendant, First Presbyterian Church of Santa Barbara, California, which alleges that said defendant paid taxes and assessments levied against the said property in the sum of \$392.77 is true except that the Court does not find as to the exact amounts so paid because of lack of evidence thereon and finds that the amounts which may have been paid constitute a lien on the said property in favor of the said defendant.

Conclusions of Law

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

I.

The deed described in the foregoing Findings of Fact was and is fraudulent and void as to plaintiff. Plaintiff is the owner and holder of the real property described in plaintiff's Bill in Equity and entitled to the possession thereof as an asset of the bankrupt estate of James Marwick and none of the defendants herein have any right, title, claim or interest therein or thereto except that defendant, First Presbyterian Church of Santa Barbara, California, is entitled to a lien on the said real property for the amount of taxes which it has actually advanced thereon from and after March 26, 1932.

Let judgment be entered accordingly. [28]

Dated: December 23, 1939.

H. A. HOLLZER

Judge of the United States
District Court

[Endorsed]: Filed Dec. 26, 1939. [29]

In the District Court of the United States
Southern District of California
Central Division
No. 1428-H Equity

M. L. RABBITT, as Trustee in Bankruptcy of the
Bankrupt Estate of James Marwick,
Plaintiff,

vs.

FIRST PRESBYTERIAN CHURCH OF SANTA
BARBARA, CALIFORNIA, a religious cor-
poration, and JAMES MARWICK,
Defendants.

JUDGMENT

This cause came on regularly to be tried on the 20th day of June, 1939, before the above entitled Court, the Hon. Harry Hollzer, Judge presiding; the plaintiff, M. L. Rabbitt, being personally present and represented by his counsel, Edward Gallaudet, Hubert Laugharn and Sampson Miller, Edward Gallaudet of counsel; the defendant, First Presbyterian Church of Santa Barbara, California, a religious corporation, being represented by its counsel Schauer, Ryon & McMahon, Robert W. McIntyre of counsel; and the defendant, James Marwick having appeared by his counsel, Stick & Moerdyke, and the said counsel for the said defendant James Warwick having advised the Court that defendant Warwick desired no relief herein and sought to be excused, and the said Marwick

and his said counsel having thereupon been excused and having taken no part in the said trial; and the said cause having been tried on the said 20th day of June, 1939 and having been continued to June 21, 1939, upon which said date the said trial was completed; and oral and documentary evidence having been introduced; and both parties having rested; and the cause having been submitted to the Court for its decision; and the Court having [30] made its Memorandum of Conclusions and Minute Order directing that plaintiff recover judgment as prayed for subject to equitable relief in favor of defendant, First Presbyterian Church of Santa Barbara, California, as hereinafter more particularly stated; and the Court having made its Findings of Fact and Conclusions of Law, Now, Therefore,

It Is Hereby Ordered, Adjudged and Decreed as follows, to-wit:

1. M. L. Rabbitt, the plaintiff herein, as Trustee in bankruptcy of the bankrupt estate of James Marwick, being number 28189-S in the records and files of the above entitled court, is the owner of and is entitled to the immediate possession of and is entitled to sell, as an asset of the said bankrupt estate, that certain real property in the County of Santa Barbara, State of California, described as follows:

Beginning at the southeast corner of Lot 61, Santa Barbara Estates, as shown in Book 15, at

pages 51 to 56 of Maps, records of Santa Barbara County; thence south $82^{\circ}25'$ west, 518.23 feet to a point on the easterly line of a road known as Cuervo Avenue, also known as Collado Avenue; thence easterly and northerly along said Cuervo Avenue, the following courses and distances: on a curve concave to the northwest, said curve having a delta of $25^{\circ}25'35''$, a radius of 63.67 feet, along the arc of said curve 28.26 feet to the end of curve; thence on a curve concave to the southeast, said curve having a delta of $48^{\circ}43'30''$ and radius of 12.85 feet, along arc of said curve 10.93 feet to the end of curve; thence on a curve concave to the east, said curve having a delta of $15^{\circ}00'$, radius of 352.25 feet, along the arc of said curve 92.22 feet to the end of curve; thence along a curve concave to the west, said curve having a delta of $40^{\circ}30'$, radius of 136.35 feet, along the arc of said curve 96.38 feet to the end of curve; thence on a curve concave to east, said curve having [31] a delta of $40^{\circ}00'$, radius 149.20 feet, along the arc of said curve 104.16 feet to the end of curve; thence on a curve concave to the northeast, said curve having a delta of $72^{\circ}00'$, radius of 89.58 feet, along the arc of said curve 112.57 feet to the end of curve; thence along a curve concave to the south, said curve having a delta of $31^{\circ}30'$, radius 303.22 feet; thence along the arc of said curve 166.70 feet to the end of the curve; thence along a curve concave to north, said curve having a delta of $53^{\circ}45'30''$, radius 65.76 feet, along the arc of said curve 61.70

feet to end of curve, thence north $61^{\circ}44'30''$ east 197.56 feet to a point on the easterly line of Lot 67 of Hope Ranch Park Subdivision, as shown on the Map recorded in Book 2, at page 24, of Maps and Surveys, in the office of the County Recorder of said County; thence continuing along said course north $61^{\circ}44'30''$ east 145.51 feet to a point; thence north $32^{\circ}00'$ west 241.86 feet to a point on the easterly line of said Lot 67 as shown on said map recorded in Book 2, at page 24, of Maps and Surveys; thence along the easterly line of Lots 67 and 69, north 100.00 feet to the point of beginning. Being a part of Lots 67, 66 and 69 of Hope Ranch Park Subdivision according to Map No. 1, recorded in Book 2, at page 24, of Maps and Surveys, in the office of the County Recorder of said County; and part of Lots 3 and 4, Subdivision of The Estate of Thos. Hope, deceased, as per Map filed in the Superior Court for Santa Barbara County in case No. 1021, in the Matter of the Partition of the Estate of Thos. Hope, deceased.

2. Defendant, James Marwick has no right, title, claim or interest in or to the said real property.

3. Defendant, First Presbyterian Church of Santa Barbara, California, has no right, title, claim or interest in or to the said real property or any part thereof and that certain document dated November 28, 1927 purporting to create a lien on the [32] said real property in favor of said First Presbyterian Church of Santa Barbara, a corporation,

is void and of no force and effect as to the plaintiff, and that certain document dated March 26, 1932 purporting to grant the said real property from James Marwick and Alice Marwick to defendant First Presbyterian Church of Santa Barbara, California, is void and of no force and effect as to the plaintiff.

4. Defendant, First Presbyterian Church of Santa Barbara, California, is adjudged to have a lien on the said real property in the amount of taxes actually paid by said defendant to the County of Santa Barbara on the said real property since March 26, 1932, the amount of said lien to be proved by said defendant, First Presbyterian Church of Santa Barbara, California, in the said bankruptcy proceeding of which plaintiff is Trustee, and plaintiff shall be entitled to pass a title to the said property free and clear of the lien of the said First Presbyterian Church of Santa Barbara, California, upon paying to the said First Presbyterian Church of Santa Barbara, California, the amount of its said lien.

5. Plaintiff shall have and recover his costs from the defendants herein which are hereby taxed in the amount of \$32.15 Dollars.

Done at Los Angeles, California in the above judicial district this 23 day of December, 1939.

H. A. HOLLZER

Judge of the United States
District Court

Judgment entered Dec 26 1939

Docketed Dec 26 1939

Book C. O. 2 Page 425

R. S. ZIMMERMAN,

Clerk,

By L. WAYNE THOMAS,

Deputy

[Endorsed]: Filed Dec. 26, 1939. [33]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the above named defendant, First Presbyterian Church of Santa Barbara, California, a religious corporation, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment of the above entitled Court in the above entitled action entered in said action on the 26th day of December, 1939.

Dated this 20th day of March, 1940.

SCHAUER, RYON & McMAHON
ROBERT W. McINTYRE

Attorneys for said Appealing
Defendant.

Address:

26 E. Carrillo Street,
Santa Barbara, California.

Mailed to: Daily & Gallaudet, Attys. for Plf. 110
West Broadway, Glendale, Calif., and: Stick &
Moerdyke, Attys. 914 Washington Bldg., Los Angeles,
L. A. for deft. Marwick

[Endorsed]: Filed Mar 20 1940 [34]

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON ON
APPEAL BY APPELLANT, FIRST PRES-
BYTERIAN CHURCH OF SANTA BAR-
BARA, CALIFORNIA

Said appellant hereby states that it intends to rely on its appeal from the above entitled Court to the Circuit Court of Appeals for the Ninth Circuit, upon the following points and propositions, to-wit:

I. That the judgment of the Court is erroneous for the reason that the evidence shows, conclusively and without conflict, that there was adequate consideration for the transfer of the property in question from defendant Marwick to this appealing defendant, and, therefore, said transfer is not void and may not be set aside.

II. That the judgment of the Court is erroneous for the reason that, regardless of the question of consideration, the evidence shows, conclusively and without conflict, that the transfer in question was made prior to the incurrence of the obligations of defendant Marwick and that said creditors were not existing [37] creditors at the date of said transfer.

III. That irrespective of the questions of adequacy of consideration and the necessity of consideration, the judgment of the Court is erroneous for the reason that the evidence shows, conclusively and without conflict, that the creditors of James

Marwick had constructive notice of said transfer more than three years prior to the adjudication of bankruptcy of said James Marwick, and, therefore, said action was barred by the statute of limitations.

Dated this 29th day of February, 1940.

SCHAUER, RYON & McMAHON
ROBERT W. McINTYRE
Attorneys for Appellant.

Receipt of a copy of the foregoing statement of points relied upon on appeal is hereby admitted this day of March 1940

Attorneys for plaintiff.

State of California,
County of Santa Barbara—ss.

Marceline Cronan, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Santa Barbara ; that affiant is over the age of eighteen years and is not a party to the within and above entitled action ; that affiant's residence business address is 26 East Carrillo Street, Santa Barbara, California. That on the 26th day of March, A. D., 1940 affiant served the within Statement of Points Relied Upon on Appeal by Appellant, First Presbyterian Church of Santa Barbara, California, on the Attorneys for Plaintiff in said action, by placing a true copy thereof in an envelope addressed to said Attorneys at the resi-

dence business address of said Attorneys, as follows: Edward Gallaudet, Hubert Laugharn and Sampson Miller, c/o Edward Gallaudet, 110 West Broadway, Glendale, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Santa Barbara, California. That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

MARCELINE CRONAN

Subscribed and sworn to before me this 26th day of March, 1940.

[Seal] **MABEL REYNOLDS**

Notary Public in and for said County and State.

[39]

[Endorsed]: Filed Mar. 27, 1940. [38]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated by and between the plaintiff above named and defendant First Presbyterian Church of Santa Barbara by and through their respective attorneys, in connection with the appeal which has heretofore been taken by said defendant, and more particularly in connection with the record on appeal, as follows, to-wit:

The parties entered into certain stipulations and agreements at the time of trial of the above entitled action and immediately subsequent thereto, which said stipulations and agreements do not appear in the reporter's transcript, and the parties now agree that the said stipulations and agreements were as hereinafter set forth and shall be deemed for all purposes to be a part of the record on appeal, and are as follows, to-wit:

1. Each and every allegation of paragraph II of Plaintiff's Bill in Equity is true and the allegations thereof are admitted by the defendant and appellant, with this exception: The claim of Marie Scheinman referred to in the said paragraph II arose on December 1, 1927 as a result of the execution of the promissory note referred to therein, and the claim of the Assets Corporation arose on August 14, 1928. No evidence was offered [40] and no stipulation entered into disclosing that either of the said claims arose prior to the said dates.

2. The two creditors referred to in the said paragraph II of plaintiff's Bill in Equity properly filed their claims in the bankruptcy proceeding referred to in paragraph I of plaintiff's Bill in Equity and the said claims were not paid and there has at no time been sufficient assets in the said bankrupt estate to pay the same.

Dated: June 11th, 1940.

SCHAUER, RYON & McMAHON
ROBERT W. McINTYRE

Attorneys for defendant and
appellant First Presbyte-
rian Church of Santa Bar-
bara, California

SAMPSON H. MILLER
HUBERT F. LAUGHREN
EDWARD GALLAUDET

Attorneys for plaintiff and
respondent

[Endorsed]: Filed Jun 12 1940 [41]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

The above named appealing defendant, First Presbyterian Church of Santa Barbara, California, a religious corporation, hereby designates the portions of the record, proceedings and evidence in the above entitled action to be included and contained in the record on the appeal of said defendant to the Circuit Court of Appeals for the Ninth Circuit, as follows, to-wit:

I. Pleadings:

- A. The Bill in Equity of the above named plaintiff.
- B. The answer of First Presbyterian Church of Santa Barbara, California, Exhibit "A" of said answer being defendant's Exhibit "B" in evidence, and Exhibit "B" of said answer being plaintiff's Exhibit "2" in evidence. [42]

II. Evidence:

- A. Reporter's transcript of testimony on trial of the above entitled action, said transcript being on file herein in duplicate.
- B. The original of defendant's Exhibit "B" in evidence, the same being a certain declaration of trust by James Marwick dated November 28, 1927, including recordation certificate.
- C. That certain original Deed from James Marwick and Alice Marwick, his wife, to First Presbyterian Church of Santa Barbara, California, dated March 26, 1932, and introduced in evidence as plaintiff's Exhibit "2", including recordation certificate.

III. Judgment, etc.:

- A. Memorandum opinion of the Court.
- B. Findings of Fact and Conclusions of Law of the Court.
- C. Judgment of the Court.
- D. Order for entry of Judgment.

IV. Record of Proceedings on Appeal:

- A. Notice of appeal.
- B. This specification of record on appeal.
- C. Statement of appellant of points on appeal.

Dated this 22nd day of March, 1940.

SCHAUER, RYON & McMAHON
ROBERT W. McINTYRE
Attorneys for Appellant.

State of California,
County of Santa Barbara—ss.

Marceline Cronan, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Santa Barbara; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 26 East Carrillo Street, Santa Barbara, California. That on the 26th day of March, A. D., 1940 affiant served the within Designation of Contents of Record on Appeal on the Attorneys for Plaintiff in said action, by placing a true copy thereof in an envelope addressed to said Attorneys at the business address of said Attorneys, as follows: Edward Gallaudet, Hubert Laugharn and Sampson Miller, c/o Edward Gallaudet, 110 West Broadway, Glendale, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Santa Barbara, California. That there is delivery service by United States mail at the place so addressed and there is

a regular communication by mail between the place of mailing and the place so addressed.

MARCELINE CRONAN

Subscribed and sworn to before me this 26th day of March, 1940.

[Seal] MABEL REYNOLDS

Notary Public in and for said County and State.

[44]

[Endorsed]: Filed Mar. 27, 1940. [43]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated that the above named defendant and appellant, First Presbyterian Church of Santa Barbara, California, may have to and including the 25th day of June, 1940, within which to file its Transcript on Appeal with the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled action.

It is further stipulated that the Record on Appeal in the above entitled matter shall consist of those documents specified in appellant's Designation of Contents of Record on Appeal and in addition thereto plaintiff's Exhibit No. 3 introduced in evidence in the above entitled action, and in addition thereto the stipulation of facts concerning certain stipulations made at the time of trial which said stipulation is filed herewith, and it is further stipu-

lated that this stipulation shall be in lieu of and supersede respondent's Designation of Contents of Record on Appeal on file herein.

It is further stipulated that where as the above named [45] defendant, James Marwick, appeared at the trial of the above entitled action and disclaimed all interest in the property involved in said action at the time of trial and asked leave of court to withdraw from said proceedings, which leave was granted by the court, therefore, the pleadings of the said James Marwick need not be included in the Record on Appeal herein.

Dated this 1st day of June, 1940.

SCHAUER, RYON & McMAHON,
ROBERT W. MCINTYRE,

Attorneys for defendant and
appellant First Presbyterian
Church of Santa Barbara,
California.

SAMPSON H. MILLER,
HUBERT F. LAUGHREN,
EDWARD GALLAUDET,

Attorneys for plaintiff and
respondent.

[Endorsed]: Filed Jun. 12, 1940. [46]

[Title of District Court and Cause.]

**ORDER GRANTING EXTENSION OF TIME
TO FILE RECORD ON APPEAL**

Upon the application of First Presbyterian Church of Santa Barbara, California, defendant named in the above entitled action, and good cause therefor appearing,

It is hereby ordered that time be extended to and including the 25th day of June, 1940, within which said defendant may file its Record on Appeal from the Judgment rendered in that certain action entitled, "In the District Court of the United States, Southern District of California, Central Division, M. L. Rabbitt, as Trustee in Bankruptcy of the Bankrupt Estate of James Marwick, Plaintiff, vs. First Presbyterian Church of Santa Barbara, California, a religious corporation, and James Marwick, Defendants, No. 1428-H".

Dated, May 31, 1940.

ALBERT LEE STEPHENS,
Circuit Judge. [48]

[Endorsed]: Filed May 31, 1940. [48]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing pages, numbered from 1 to 48, inclusive, contain full, true and

correct copies of Bill in Equity; Answer of First Presbyterian Church of Santa Barbara; Memorandum of Conclusions and Order Nov. 3, 1939; Minute Order Nov. 3, 1939; Judgment; Notice of Appeal; Bond for Costs on Appeal; Statement of Points Relied Upon by Appellant; Stipulation of Facts; Designation of Record on Appeal; Stipulation Extending Time to Docket Appeal; Order re original exhibits; Original Order Extending Time to Docket Appeal, which together with original exhibits and Reporter's Transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the Clerk for comparing, correcting and certifying the foregoing record amount to \$7.85, and that said amount has been paid me by the Appellant herein.

Witness my hand and the Seal of the District Court of the United States for the Southern District of California, this 24th day of June, A. D. 1940.

[Seal]

R. S. ZIMMERMAN,

Clerk.

By EDMUND L. SMITH,

Deputy Clerk. [49]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Los Angeles, California,

Wednesday, June 21, 1939, 10 A. M.

Mr. Gallaudet: Now, if the court please, in paragraph 4 of our complaint we allege, and the answer admits, that on or about the 30th day of March, 1932, James Marwick, the Bankrupt, caused to be recorded in the office of the County Recorder of Santa Barbara County a deed to the real property which is the subject matter of this action. The answer admits that such a deed was recorded, and sets it up in haec verba, as Exhibit B. I think, from the standpoint of orderly procedure, inasmuch as that deed at least is one of the documents relied upon here, as I understand it from the statement of facts submitted by the defendant, and is the document which the proof seeks to set aside, that it might be offered now for identification so that we may refer to it more expeditiously.

Mr. McIntyre: We have the originals of both documents here, which are set up in the answer.

The Court: They might be marked for identification at this time, and then you can inquire as to the circumstances under which they were executed.

Mr. McIntyre: And if delivery is properly shown they can be forthwith admitted.

Mr. Gallaudet: I think they will go in before the trial is over, counsel. I admit their genuineness, and we will establish delivery. [50]

Mr. McIntyre: They may be marked as exhibits at this time. I think they should be plaintiff's exhibits.

The Court: Mark it Exhibit 1 for identification at this time. Which is the earlier of the two?

Mr. Gallaudet: The earlier of the two is entitled, I believe: Trust Indenture.

Mr. McIntyre: Yes, Declaration of Trust, dated the 28th day of November, 1927.

The Court: What is the date?

Mr. Gallaudet: The document bears date the 28th day of November, 1927, and appears on its face to have been executed before a Notary Public on that date.

The Court: By whom?

Mr. Gallaudet: By James Marwick, one of the defendants in this action. I believe, for the sake of the record, we may perhaps from time to time refer to him as the Bankrupt, to distinguish him from the defendant First Presbyterian Church.

The Court: Very well. The other—?

Mr. Gallaudet: The other document appears to be a deed. I say appears to be, because it is not entitled as such, but it is a document which I think we will refer to as the deed, dated, if the court please, March 26, 1932.

The Court: Purporting to be executed by James Marwick?

Mr. Gallaudet: Purporting to be executed by James Marwick, and in this case, Alice Marwick, his wife. [51]

The Court: To whom?

Mr. Gallaudet: The First Presbyterian Church of Santa Barbara, California, who is admitted here to be the defendant who is now before us.

The Court: Very well, that will be marked Plaintiff's No. 2 for identification.

Mr. McIntyre: I wonder if you would care to stipulate as to the payment of taxes by the Church? We sent a statement to you. We have some, but not all, of the tax receipts.

Mr. Gallaudet: Couldn't we get at it this way: I will make no objection to the use of the tax receipts, and, as to any that are missing, if you will state those were paid in those amounts I will make no objection. I am only interested in knowing when the Church started to pay the taxes.

Mr. McIntyre: I can't be sure whether the Church started paying taxes in 1927 or 1932. One statement received states '27. The statement was that the Church paid from '27, but in searching the tax receipts, we have only been able to find tax receipts from '32, and I think '36 is missing. Perhaps we can stipulate from '32 on.

Mr. Gallaudet: Yes.

Mr. McIntyre: I have them here, minus one year.

Mr. Gallaudet: I have no objection to that.

Mr. McIntyre: I think it is 1936. We start with '32. [52]

Mr. Gallaudet: Would it inconvenience counsel to offer those in evidence? I will make no objection

upon the ground of their not being the best evidence, or anything of that sort.

Mr. McIntyre: Let us offer them for identification at the present time.

The Court: We will mark the series of tax receipts as Defendant's Exhibit A. What years do they cover?

Mr. McIntyre: 1932 to 1937, with the exception of one year. [53]

FRED H. SCHAUER,

a witness called by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: Will you state your name?

A. Fred H. Schauer.

Direct Examination

Q. By Mr. Gallaudet: Mr. Schauer, you are a member of the present firm of Schauer, Ryan & McMahon? A. I am.

Q. Who are presently attorneys of record for the First Presbyterian Church of Santa Barbara?

A. Yes, with Robert W. McIntyre.

Q. Do you have in mind the document which we have referred to as the Trust Indenture, copy of which is annexed to the answer of defendants, and which appears to have been executed by James Marwick on November 28, 1927?

A. I have it in mind.

Q. You are familiar with the document?

(Testimony of Fred H. Schauer.)

A. Yes, quite so. I have examined it recently.

Q. The document I now have in my hand is a copy of the answer filed by the defendant Church. Referring to the statement contained therein that the instrument is left in the possession of Messrs. Schauer & Ryan, attorneys-at-law,—the gentleman named there is you, I take it? A. Yes. [54]

Q. So that this document, Plaintiff's Exhibit 1 for identification, was, as stated therein, handed to you at that time? A. Yes.

Q. Is that correct?

A. I don't know whether it was handed to me, or mailed to me. I would have to look at the document itself to tell that.

Q. At that time, when you did receive the document, were you attorney, or was your firm attorneys for the First Presbyterian Church of Santa Barbara?

A. I don't recall. When was that document dated,—1927?

Q. The date of the document is November 28, 1927.

A. No, I was not an official, nor was I attorney, except—

Mr. McIntyre: I think the witness has misconstrued your question. Would you mind asking it again?

Mr. Gallaudet: Will you read it, Mr. Reporter?
(Question read by the reporter.)

(Testimony of Fred H. Schauer.)

A. I would have to see the document itself.

The Court: What is that exhibit?

Mr. Gallaudet: It is Exhibit 1 for identification and is now being handed the witness.

A. It is pretty hard to answer that. May I explain?

Q. Certainly. [55]

A. Mr. Marwick had employed me in another matter, and suggested this instrument be prepared as security for his pledge. I took it up with the then chairman of the Board of Trustees, or someone connected with the Board, and they authorized me to accept such a document and hold it, so that I was acting for them in that respect.

Q. Pursuant to that authorization from the Church, you thereafter did receive the document, and did hold it, is that correct, Mr. Schauer?

A. Yes, I did.

Q. Are you a member of the Board of Trustees of the Church? A. I beg your pardon?

Q. Are you a member of the Board of Trustees of the Church? A. No, I am not.

Q. Were you ever a member of the Board of Trustees of the Church?

A. Yes, I was, but I think that was in the early '20s.

Q. In the early '20s? A. Yes.

Q. How long a time did you continue to be such a member, Mr. Schauer?

(Testimony of Fred H. Schauer.)

A. I think I was on two or three times, and I believe I was on for one term in the '30s, but I don't remember the date. [56]

The Court: In other words, you were not a member of the Board of Trustees at the time this instrument was left with you?

A. No, I was not a member. I checked that yesterday. I was not a member in 1927.

Q. By Mr. Gallaudet: Referring to the document that you have in your possession, Plaintiff's Exhibit No. 1 for identification, and on the reverse side of the cover, Mr. Schauer, you will observe the recording date. What is that date?

A. March 24, 1934.

Q. Were you a member of the Board of Trustees at that time? A. I don't know.

Q. Could you tell me who caused that document, Plaintiff's Exhibit No. 1 for identification, to be recorded?

A. I did, at the request of Mr. Marwick, and of the chairman of the Board of Trustees—whatever was then acting.

Q. You don't know whether you were then a member of the Board of Trustees?

A. No, I do not recall that.

Q. At that time would you say you were representing the Church in connection with this transaction?

A. Yes; that is, I was authorized by them.

(Testimony of Fred H. Schauer.)

Q. I show you a document, Mr. Schauer, which appears to be a photostatic copy of a letter, and ask you if you have [57] any recollection of the original of that document.

A. That is not my signature, but it looks like the handwriting of my secretary. I have no independent recollection of it, but I have no doubt that it was sent from my office, and at my dictation.

Mr. Gallaudet: I ask that this letter be marked Plaintiff's Exhibit No. 3 for identification.

The Court: It will be so marked.

Mr. Gallaudet: I now, counsel, offer the document as an exhibit in evidence.

Mr. McIntyre: I have the copy here, and it corresponds to the copy in our files, so it may go in.

Mr. Gallaudet: Very well.

The Court: May I see the instrument?

Mr. Gallaudet: I was a little hesitant in offering it, because I was prepared to prove the making of the photostatic copy, and the loss of the original.

The Court: The instrument then will go in evidence as Exhibit 3. May it be deemed to have been read into the record, without taking up the time now?

Mr. Gallaudet: So stipulated.

Mr. McIntyre: So stipulated.

(Testimony of Fred H. Schauer.)

PLAINTIFF'S EXHIBIT NO. 3

Fred H. Schauer
Harrison Ryon
Julien F. Goux
Leo T. McMahon

Cable Address
Schaueryon
Telephone 7109

Schauer, Ryon & Goux
Attorneys-at-Law
26 East Carrillo Street
Santa Barbara, California

March 24, 1932.

Mr. James Marwick,
8590 Hollywood Boulevard,
Hollywood, California.

Dear Mr. Marwick:

The Declaration of Trust which we talked about the other day was recorded today and now I am sending you the deed for the signatures of yourself and Mrs. Marwick as we discussed this afternoon. I think this will be the best way of handling the matter.

The Trustees of the church feel very grateful towards you. They do not like to take the property and are doing so solely because they believe you wish the church to have it and because their taking it will prevent it going into the hands of undeserving creditors.

This deed will have to be acknowledged before a Notary Public.

(Testimony of Fred H. Schauer.)

With best regards and again thanking you, I remain

Most cordially yours,
FRED H. SCHAUER

FHS:MR

Encl.

[Endorsed]: Pltf's Exhibit No. 3. Filed June 21, 1939. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

Q. By Mr. Gallaudet: Now, Mr. Schauer, you have observed that Plaintiff's Exhibit No. 1 for identification was recorded some years after the date it bears. Do you have any independent recollection as to the date upon which [58] the document was delivered to you? That is, it would be presumably some time between the date of its execution or making, and the date of its recordation.

A. This instrument that I have in my hand was delivered to me immediately upon its execution, in my office, by Mr. Marwick. That would be the 28th day of November, 1927.

The Court: That is Exhibit No. 1?

A. Exhibit No. 1.

Q. By Mr. Gallaudet: And held by you in your possession until the date it was recorded?

A. Yes.

Q. Now, Mr. Schauer, as I understand it, there was no consideration paid by the First Presbyterian

(Testimony of Fred H. Schauer.)

Church of Santa Barbara to James Marwick, or to anyone else, for the deed, Plaintiff's Exhibit No. 2 for identification, other than the considerations referred to in the Trust Indenture, to-wit, Plaintiff's Exhibit 1 for identification?

Mr. McIntyre: I am afraid I am going to have to interpose an objection to that question in the form it is put. Of course, it calls for the opinion and conclusion of the witness.

The Court: The objection is well taken.

Mr. McIntyre: My only reason for interposing the objection is that it is a blanket question, covering a number of transactions.

Q. By Mr. Gallaudet: Mr. Schauer, do you know whether [59] or not the Church paid any money to Mr. Marwick in exchange for the deed, being Plaintiff's Exhibit No. 2 for identification? I think perhaps you can answer that yes or no, if you know.

A. Not through my hands, no.

The Court: Would it be correct to say—I am interrupting here in the light of the fact that a pre-trial memorandum was filed by defendant's counsel—that the consideration which the defendants claim was given for this conveyance is as outlined in the pre-trial brief?

Mr. McIntyre: That is correct. Our consideration, we claim, is set forth in that.

The Court: That would cause the inference, which is quite obvious, that the Board paid no money for this conveyance, but, instead, cancelled

(Testimony of Fred H. Schauer.)

Mr. Marwick's indebtedness to the Church by virtue of some one or more prior pledges.

Mr. McIntyre: That is our position.

Mr. Gallaudet: I gather, from a fair reading of the answer, and the statement of facts, that it was more or less admitted that no cash consideration passed. The deed itself, however, recites other good and valuable considerations, and I am only now trying to negative any possible inference in that connection.

Mr. McIntyre: I think we can stipulate that the Board paid no cash for the deed. I don't mean by that stipulation to go any further than that, however: That no one paid [60] cash, or no cash was paid by the Church; that the Church paid Mr. Marwick no cash for that deed.

Mr. Gallaudet: May it be further stipulated that no one paid any cash to Mr. Marwick on behalf of the Church?

Mr. McIntyre: I think we can stipulate that Mr. Marwick personally received no cash for either of the instruments.

Mr. Gallaudet: That is all I have in mind.

Mr. McIntyre: All right.

Mr. Gallaudet: I assume we may take it that the word "cash" includes in this connection cash or—

Mr. McIntyre: —or property.

Mr. Gallaudet: —or property going to him.

The Court: Perhaps I should add to the statement I just made, to which I understand counsel

(Testimony of Fred H. Schauer.)

for the defendants has stipulated, that the pledge or pledges which the Church cancelled as the consideration for this conveyance were made in conjunction with, or as a part of, an undertaking whereby other pledges were obtained by the Church.

Mr. McIntyre: We are prepared to establish that.

The Court: I am merely stating that as the position of the defendants.

Mr. Gallaudet: I understand that to be their position. The plaintiff now offers into evidence, if the court please, Plaintiff's Exhibit 2 for identification, being the deed in question, and which we offer pursuant to our allegation in paragraph 4 that a deed was executed and delivered. [61]

The Court: It will now be admitted in evidence as Plaintiff's Exhibit 2. I think we marked the photostat of the letter as Exhibit 3.

PLAINTIFF'S EXHIBIT No. 2

This indenture, made this 26th day of March, 1932, by and between James Marwick and Alice Marwick, his wife, of Los Angeles County, California, parties of the first part, and First Presbyterian Church of Santa Barbara, California, a religious corporation, organized and existing under and by virtue of the laws of the State of California, party of the second part,

(Testimony of Fred H. Schauer.)

Witnesseth:

That whereas said James Marwick, one of the parties of the first part, heretofore made a pledge to the building and reconstruction fund of the said party of the second part, which pledge was secured by an instrument dated November 28, 1927, recorded in Book 262, Page 267 Official Records of Santa Barbara County, California, imposing a lien on the real property therein and hereinafter described, wherein and whereby said James Marwick agreed that in the event of his death prior to paying said sum of \$25,000.00 to said party of the second part or in the event of his failure to pay the same within ten years from the 28th day of November, 1927, the said party of the second part would take record title to said property and be the sole owner thereof, and

Whereas the party of the second part is at this time willing to accept the fee title to said property and in consideration thereof release said James Marwick from all his obligations to said party of the second part,

Now therefore this indenture witnesseth:

That the said parties of the first part, for and in consideration of the sum of Ten Dollars to them in hand paid, and other valuable considerations to them passing from the party of the second part, including a complete release from all obligations of said James Marwick to said party of the second

part, do by these presents grant, bargain, sell, convey and confirm unto said party of the second part, its successors and assigns forever, the following described land in the County of Santa Barbara, State of California, described as follows:

Beginning at the southeast corner of Lot 61, Santa Barbara Estates, as shown in Book 15, at pages 51 to 56, of Maps, records of Santa Barbara County; thence south $82^{\circ}25'$ west, 518.23 feet to a point on the easterly line of a road known as Cuervo Avenue, also known as Collado Avenue; thence easterly and northerly along said Cuervo Avenue, the following courses and distances: on a curve concave to the northwest, said curve having a delta of $25^{\circ}25'35''$, a radius of 63.67 feet, along the arc of said curve 28.26 feet to the end of curve; thence on a curve concave to the southeast, said curve having a delta of $48^{\circ}43'30''$ and radius of 12.85 feet, along arc of said curve 10.93 feet to the end of curve; thence on a curve concave to the east, said curve having a delta of $15^{\circ} 00'$, radius of 352.25 feet, along the arc of said curve 92.22 feet to the end of curve; thence along a curve concave to the west, said curve having a delta of $40^{\circ}30'$, radius of 136.35 feet, along the arc of said curve 96.38 feet to the end of curve; thence on a curve concave to east, said curve having a delta of $40^{\circ}00'$, radius 149.20 feet, along the arc of said curve 104.16 feet to the end of curve; thence on a curve concave to the northeast, said curve having a delta of $72^{\circ}00'$, radius of 89.58 feet, along the arc of said curve

112.57 feet to the end of curve; thence along a curve concave to the south, said curve having a delta of $31^{\circ}30'$, radius 303.22 feet; thence along the arc of said curve 166.70 feet to the end of the curve; thence along a curve concave to north, said curve having a delta of $53^{\circ}45'30''$, radius 65.76 feet, along the arc of said curve 61.70 feet to end of curve; thence north $61^{\circ}44'30''$ east 197.56 feet to a point on the easterly line of Lot 67 of Hope Ranch Park Subdivision, as shown on the Map recorded in Book 2, at page 24, of Maps and Surveys, in the office of the County Recorder of said County; thence continuing along said course north $61^{\circ}44'30''$ east 145.51 feet to a point; thence north $32^{\circ}00'$ west 241.86 feet to a point on the easterly line of said Lot 67 as shown on said map recorded in Book 2, at page 24, of Maps and Surveys; thence along the easterly line of Lots 67 and 69, north 100.00 feet to the point of beginning. Being a part of Lots 67, 66 and 69 of Hope Ranch Park Subdivision according to Map No. 1, recorded in Book 2, at page 24, of Maps and Surveys, in the office of the County Recorder of said County; and part of Lots 3 and 4, Subdivision of The Estate of Thos. Hope, deceased, as per Map filed in the Superior Court for Santa Barbara County in Case No. 1021, in the Matter of the Partition of the Estate of Thos. Hope, deceased.

Together with all the tenements hereditaments and appurtenances thereunto belonging or in any-wise appertaining.

To have and to hold all and singular the above described premises, together with the appurtenances, unto the said party of the second part, its successors and assigns, forever.

The said party of the second part, for and in consideration of the execution of this deed and the delivery thereof, hereby releases, exonerates and forever discharges said James Marwick from any and all obligations and liabilities arising out of said pledge of \$25,000.00 for said building and reconstruction fund.

In witness whereof, the parties of the first part have hereunto set their hands and the party of the second part has caused its name to be hereunto subscribed by its President and Secretary thereunto duly authorized by resolution of its board of trustees, the day and year first hereinabove written.

ALICE MARWICK

JAMES MARWICK

Parties of the first part.

[Seal] FIRST PRESBYTERIAN CHURCH
OF SANTA BARBARA

By EUGENE H. LYMAN

President Board of Trustees

By H. M. GENTRY

Acting Secretary Board of Trustees

State of California,

County of Los Angeles—ss.

On this 26 day of March, A. D., 1932, before me, the undersigned a Notary Public in and for said

County and State, personally appeared James Marwick and Alice Marwick, known to me, to be the persons whose names are subscribed to the within Instrument, and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] O. L. MONTGOMERY
Notary Public in and for said County and State.

My Commission Expires Sep. 23, 1933.

State of California,
County of Santa Barbara—ss.

On this 29th day of March in the year one thousand nine hundred and thirty-two, before me, Mabel Reynolds, a Notary Public in and for the said County of Santa Barbara, State of California, residing therein, duly commissioned and sworn, personally appeared Eugene H. Lyman and H. M. Gentry, known to me to be the President and acting Secretary, respectively of the corporation described in and that executed the within instrument, and also known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, in the said County of

Santa Barbara, the day and year in this certificate
first above written.

[Seal] MABEL REYNOLDS

Notary Public in and for the said County of Santa
Barbara, State of California.

My Commission expires April 4, 1932.

Whereas the pledge of James Marwick of the sum of \$25,000.00 for the building and reconstruction fund of the First Presbyterian Church of Santa Barbara, California, secured by a Declaration of Trust on certain real property near Santa Barbara, California, is unpaid, and

Whereas said James Marwick is willing to deed said property in consideration of a release from said pledge and the board of trustees believe the same to be for the best interests of the church,

Now, therefore, be it resolved, that the said deed be accepted and that in consideration therefor a complete release and discharge be given to said James Marwick of all liabilities and obligations under said pledge, and

Be it further resolved, that the president and secretary of this board be and they are hereby authorized and directed to subscribe the name of the First Presbyterian Church of Santa Barbara to said deed as second party therein.

I hereby certify that the foregoing is a true and correct copy of a Resolution passed and adopted at a meeting of the board of trustees of the First Presbyterian Church of Santa Barbara at a called

meeting thereof held on the 29th day of March, 1932, a quorum being present and voting and that said resolution has not been cancelled, annulled or rescinded and is now of record in the minutes of said board of trustees.

Dated, March 29th, 1932.

H. M. GENTRY

Acting Secretary Board of
Trustees.

[Endorsed]: Recorded at request of Schauer, Ryon & Goux. Mar. 30, 1932, at 7 min. past 10 o'clock A. M. in Book 259 of Official Records, Page 305. Records of Santa Barbara County, Cal. Yris Covarrubias, County Recorder. By Lucy E. [illegible], Deputy Recorder.

Fee 1.90

[Endorsed]: Pltf's Exhibit No. 2. Filed June 21, 1939. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

Mr. Gallaudet: I think so, your Honor. Plaintiff now relies upon the statement made in the Statement of Facts, of the defendant, that at the time the deed was delivered—that is on page 2, paragraph 4—as follows:

“In March of 1932”

—which your Honor will observe was the time of recording of both these instruments—

"In March of 1932 the defendant Marwick informed the Church that he would not be able to perform the obligation he had assumed in the deed of trust; that because of his age and the fact that his money was exhausted he would not be able to make good his pledge and then and there offered to give the church a deed absolute to the property here in question. At this time Marwick did inform the Church that he had other obligations to which the property might be subjected if the church did not enforce its rights thereto."

That is the end of the statement upon which plaintiff relies. I think these matters could be elicited by lengthy questioning of Mr. Schauer.

Mr. McIntyre: You are satisfied with our statement?

Mr. Gallaudet: Yes. [62]

The Court: Then I take it that the defendants admit the truth of the matters just recited?

Mr. McIntyre: Yes.

Mr. Gallaudet: Of course, it is understood that we admit that it is true, as stated therein, that Mr. Marwick informed them of these matters. That is, as the statement states. I think the statement the court made is correct. Plaintiff admits the truth of these documents.

Mr. McIntyre: I might add to that that we have no information as to the nature of the claims or anything of that sort; just that there were claims.

Mr. Gallaudet: Yes, I understand. I have no more questions to ask this witness.

Mr. McIntyre: We will have no cross examination.

Mr. Gallaudet: I would like to call Mrs. Scheinman. [63]

MARIE SCHEINMAN,

a witness called by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: Please state your name.

A. Marie Scheinman.

Direct Examination

Q. By Mr. Gallaudet: Are you the Marie Scheinman named as plaintiff in the action which has been heretofore discussed against James Marwick and others? A. Yes, sir.

Q. Do you now understand that this present action which we are trying here today is an action to set aside a transfer to real property?

A. Yes.

Q. You know that? A. Yes.

Q. When did you first know that James Marwick transferred or deeded the property involved in this action to the First Presbyterian Church of Santa Barbara?

A. I did not know it until my attorney, Mr. Miller, notified me.

(Testimony of Marie Scheinman.)

Q. Your first knowledge then was from Mr. Miller? A. Yes.

Mr. Gallaudet: Cross-examine, counsel.

The Court: I don't think the witness testified when she [64] got that information.

Cross Examination

Q. By Mr. McIntyre: When did you get that information? A. From Mr. Miller?

Q. Yes, the approximate date—roughly?

A. I really don't remember.

Mr. Gallaudet: I might say that I intend calling Mr. Miller and asking him when he told her.

Q. By Mr. McIntyre: You can't fix even approximately the date? I am not asking you for the exact date.

A. No, I cannot; I am sorry.

Q. You cannot state whether it was after Mr. Marwick's bankruptcy or before?

A. I think it was after. I don't know.

The Court: I can't hear you, madam.

A. I said I did not know. I really don't know when he told me, but I know he told me after; I did not know anything of it until he notified me, and that was after bankruptcy.

Q. By Mr. McIntyre: After bankruptcy?

A. Yes.

Mr. McIntyre: That is all.

Mr. Gallaudet: I will now call Mr. Miller. [65]

SAMPSON H. MILLER,

a witness called by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: State your name.

A. Sampson H. Miller.

Direct Examination

Q. By Mr. Gallaudet: Mr. Miller, are you the Sampson H. Miller who appears to be an attorney of record in the case of Scheinman v. Marwick and others?

A. Yes, I was one of the attorneys of record in that case.

Q. You were the attorney who took care of the matter of obtaining the judgment in question here?

A. That is correct.

Q. Can you state to the court when was the first occasion of your ascertaining that James Marwick had transferred the property involved in this action to the defendant, First Presbyterian Church of Santa Barbara?

Mr. McIntyre: I wonder if I might inquire as to just where this is going? Perhaps we can stipulate, or perhaps it is immaterial.

Mr. Gallaudet: A question is presented in the pleadings, if the court please, as to the Statute of Limitations. There is a code section—without admitting that it is now binding on the trustee in any way, or [66] is a proper defense here,—but there is a code section of the State of California indicating that an action based on fraud must be

(Testimony of Sampson H. Miller.)

brought within three years after discovery of the fraud. The purpose of this line of questioning is to show that as to this creditor no information was had as to this transfer until much less than three years before the bankruptcy proceeding. Of course, the Statute does not run after the filing of the petition, until two years after the closing of the estate. That is the purpose of the evidence.

Mr. McIntyre: That he had no actual knowledge?

Mr. Gallaudet: No actual knowledge.

Mr. McIntyre: That excludes any knowledge that would be imputed to her from the record?

Mr. Gallaudet: Obviously a document that is recorded imputes knowledge. That is another matter.

Mr. McIntyre: What date do you wish to establish as to the acquiring actual knowledge?

Mr. Gallaudet: I expect the evidence to show that it was within a year prior to the filing of the bankruptcy petition.

Mr. McIntyre: It was within the year prior?

Mr. Gallaudet: Yes.

Mr. McIntyre: It conflicts somewhat with Mrs. Scheinman's testimony. She stated it was after.

Mr. Gallaudet: I heard her say that. [67]

Mr. McIntyre: She said he told her afterward. What date do you want to establish?

Q. By Mr. Gallaudet: Can you give the date?

(Testimony of Sampson H. Miller.)

A. Yes, I think I can. As I recall it, subsequent to the rendition of the judgment we had an execution issued some time in October of 1935, against Mr. Marwick, and acting in accordance with instructions in that execution the Marshal of the Municipal Court went up to Mr. Marwick's house and there levied and seized certain personal property—I think stock certificates, and some other documents, perhaps, of various kinds, and brought them into his possession. I inspected those documents at the Marshal's office, and among those documents I found a copy of the Declaration of Trust, in which Mr. Marwick had declared that he was setting aside this piece of property for the Church.

Q. That was the first information you had concerning the transfer involved in this action, is that correct?

A. Yes. I would say that was either October or November, 1935.

Mr. Gallaudet: Cross-examine.

Mr. McIntyre: No cross examination.

Mr. Gallaudet: That is all. Your Honor will observe in paragraph 1 of the complaint the alleged date of the bankruptcy, and it is admitted by the answer.

The Court: I understand there is no controversy as to the allegations of paragraph 1 of the complaint. [68]

Mr. Gallaudet: I think they are specifically admitted, are they not?

Mr. McIntyre: The bankruptcy is admitted.

Mr. Gallaudet: For your Honor's information, paragraph 1 alleges the adjudication of bankruptcy was July 10, 1936. That is alleged and not denied. Subject, if the court please, to the information referred to awhile ago, in the court's instruction that both counsel examine the files of the bankruptcy court, the plaintiff now rests. [69]

GEORGE W. WILSON,

called as a witness on behalf of the defendant, First Presbyterian Church of Santa Barbara, being first duly sworn, testified as follows:

The Clerk: Please state your name.

A. George W. Wilson.

The Court: May I suggest, in the light of what has already been disclosed, that unless some incident arises to indicate some other method should be followed, that counsel lead the witness; that he ask leading questions, so that we can cover as much of this ground as we reasonably can.

Mr. Gallaudet: There is no objection, unless the same be made specifically.

The Court: Yes; in other words, I shall assume that both sides are apprised of what are the respective contentions here.

Mr. Gallaudet: Yes.

The Court: And that there is not going to be much controversy about facts, as distinguished from the legal effect to be drawn therefrom.

Mr. Gallaudet: I think that is true, your Honor.

(Testimony of George W. Wilson.)

Direct Examination

Q. By Mr. McIntyre: Mr. Williams, you are a member of the congregation of the First Congregational Church of Santa Barbara? [70]

A. My name is Wilson, and I am a member of the First Presbyterian Church.

Q. I will rephrase that, Mr. Wilson: You were a member of the congregation of the First Presbyterian Church of Santa Barbara during the year 1927, were you not? A. I was.

Q. At that time were you acquainted with James Marwick? A. I was.

Q. Do you recall a meeting of the Church and congregation during the first part of 1927, for the purpose of raising funds to pay off the indebtedness of the Church?

A. Very muchly, yes, sir.

The Court: When did you say that was?

Mr. McIntyre: In the early part of 1927.

The Witness: In January.

Q. By Mr. McIntyre: In January of that year. Will you tell the court in your own words approximately what happened at that time?

A. They were trying to secure subscriptions from the different members of the Church. We had all been considering some kind of a donation, and they had a minister there by the name of Snivley, as I recall the name, and all of a sudden he brings

(Testimony of George W. Wilson.)

Mr. Marwick up on the platform and announces that he has made a big subscription of \$25,000 toward liquidating the debt of this Church; and on the strength of that I know I made my subscription.

[71]

Mr. Gallaudet: I have no objection to the witness proceeding, if it may be understood that legal conclusions may be moved to be stricken out on objection thereto. For instance, we get right down to the matter of this thing when we say on the strength of what Mr. Marwick did.

Mr. McIntyre: I am not entirely sure that is a legal conclusion.

The Court: I take it that the witness, without telling us what the legal effect is of what occurred, may disclose what it was that led him at least to make a subscription, and whether or not other subscriptions were made following this announcement by the minister to the effect that Mr. Marwick had made a subscription of \$25,000.

Q. By Mr. McIntyre: Were you or were you not influenced by that?

A. I was, and gave \$1,000 at that time to pay off the debt.

Q. Were there any other subscriptions made at that time?

A. Yes, I know personally my friend Harry Gentry, who sat by my side, did the same thing.

Q. He made a subscription also of \$1,000?

A. He did.

(Testimony of George W. Wilson.)

Q. Were there other subscriptions?

A. Yes, several of them that I heard of and knew of. In other words, they raised the entire amount of the debt during this campaign on the strength of that donation, or [72] pledge, or whatever you want to call it.

Q. Did you pay your subscription?

A. I did.

Q. Did Mr. Gentry pay his?

A. He did. I was treasurer of the Church for three years afterwards, and I can tell you all of them paid it. I went over to see.

Mr. McIntyre: That is all.

Cross Examination

Q. By Mr. Gallaudet: I will ask you this question: Do you know whether Mr. Marwick was an officer or a trustee of the Church at any time?

A. Not to my knowledge.

Mr. Gallaudet: That is all.

Mr. McIntyre: I wish to offer at this time Exhibit No. 1. I think counsel offered in evidence, Exhibit No. 2, Plaintiff's exhibit. I now wish to offer Exhibit No. 1, which is the Declaration of Trust.

Mr. Gallaudet: No objection.

The Court: Then that will become Defendant's Exhibit B.

(Testimony of George W. Wilson.)

DEFENDANT'S EXHIBIT B.

Know All Men by these presents:

That, whereas I, James Marwick, the undersigned, have heretofore offered and agreed to pay to the First Presbyterian Church of Santa Barbara, a corporation, the sum of \$25,000.00 to be applied towards the reconstruction of the House of Worship of said Presbyterian Church and the building of additions thereto, which said agreement was predicated upon my being able to sell certain real property then belonging to myself on LaMesa in Santa Barbara County, California, and

Whereas said property has been sold but under terms and conditions which will not admit of the payment of said sum of \$25,000.00 in cash, and

Whereas I also hold the below described property and am desirous that the said sum of \$25,000.00 shall be a charge against the same,

Now therefore these presents certify:

That I own and hold said property in trust for and as security for the payment of said sum of \$25,000.00 to the First Presbyterian Church of Santa Barbara and that in the event of my death prior to paying said sum of \$25,000.00 or in the event of my failure to pay the same within ten years from date hereof then said First Presbyterian Church of Santa Barbara shall take record title to said property and be the sole owner thereof and I shall relinquish all claims whatsoever thereto. I leave this instrument in the possession of Messrs.

(Testimony of George W. Wilson.)

Schauer & Ryon, attorneys at law, Santa Barbara, California, and they are hereby instructed to carry the terms hereof into effect.

The real property which is the subject of this trust is described as follows:

The following described land in the County of Santa Barbara, State of California, described as follows:

Beginning at the southeast corner of Lot 61, Santa Barbara Estates, as shown in Book 15, at pages 51 to 56, of Maps, records of Santa Barbara County; thence south $82^{\circ} 25'$ west, 518.23 feet to a point on the easterly line of a road known as Cuervo Avenue, also known as Collado Avenue; thence easterly and northerly along said Cuervo Avenue, the following courses and distances: on a curve concave to the northwest, said curve having a delta of $25^{\circ} 25' 35''$, a radius of 63.67 feet, along the arc of said curve 28.26 feet to the end of curve; thence on a curve concave to the southeast, said curve having a delta of $48^{\circ} 43' 30''$ and radius of 12.85 feet, along arc of said curve 10.93 feet to the end of curve; thence on a curve concave to the east, said curve having a delta of $15^{\circ} 00'$, radius of 352.25 feet, along the arc of said curve 92.22 feet to the end of curve; thence along a curve concave to the west, said curve having a delta of $40^{\circ} 30'$, radius of 136.35 feet, along the arc of said curve 96.38 feet to the end of curve; thence on a curve concave to east, said curve having a delta of $40^{\circ} 00'$, radius

(Testimony of George W. Wilson.)

149.20 feet, along the arc of said curve 104.16 feet to the end of curve; thence on a curve concave to the northeast, said curve having a delta of $72^{\circ} 00'$, radius of 89.58 feet, along the arc of said curve 112.57 feet to the end of curve; thence along a curve concave to the south, said curve having a delta of $31^{\circ} 30'$, radius 303.22 feet; thence along the arc of said curve 166.70 feet to the end of the curve; thence along a curve concave to north, said curve having a delta of $53^{\circ} 45' 30''$, radius 65.76 feet, along the arc of said curve 61.70 feet to end of curve; thence north $61^{\circ} 44' 30''$ east 197.56 feet to a point on the easterly line of Lot 67 of Hope Ranch Park Subdivision, as shown on the Map recorded in Book 2, at page 24, of Maps and Surveys, in the office of the County Recorder of said County; thence continuing along said course north $61^{\circ} 44' 30''$ east 145.51 feet to a point; thence north $32^{\circ} 00'$ west 241.86 feet to a point on the easterly line of said Lot 67 as shown on said map recorded in Book 2, at page 24, of Maps and Surveys; thence along the easterly line of Lots 67 and 69, north 100.00 feet to the point of beginning. Being a part of Lots 67, 66 and 69 of Hope Ranch Park Subdivision according to Map No. 1, recorded in Book 2, at page 24, of Maps and Surveys, in the office of the County Recorder of said County; and part of Lots 3 and 4, Subdivision of The Estate of Thos. Hope, deceased, as per Map filed in the Superior Court for Santa Barbara

(Testimony of George W. Wilson.)
County in Case No. 1021, in the Matter of the Partition of the Estate of Thos. Hope, deceased.

Witness my hand this 28th day of November, 1927.

JAMES MARWICK.

State of California,
County of Santa Barbara—ss.

On this 28th day of November in the year one thousand nine hundred and twenty-seven before me, Mabel Reynolds, a Notary Public in and for the said County of Santa Barbara, personally appeared James Marwick, known to me to be the person whose name is subscribed to the within instrument, and he acknowledged to me that he executed the same.

In Witness whereof, I have hereunto set my hand and affixed my Official Seal, at my office in the said County of Santa Barbara the day and year in this certificate first above written.

[Seal] MABEL REYNOLDS,
Notary Public in and for the said County of Santa Barbara, State of California.

My Commission expires April 4, 1928.

[Endorsed]: Recorded at request of Schauer, Ryon & Goux, Mar. 24, 1932, at 45 min. past 4 o'clock P. M., in Book 262 of Official Records, page 267 Records of Santa Barbara County, Cal. Yris Co-varrubias, County Recorder. By Esther Goss, Deputy Recorder. Fee, \$1.80.

(Testimony of George W. Wilson.)

[Endorsed]: Deft's Exhibit No. "B". Filed June 21, 1939. R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

Mr. McIntyre: We will offer the tax receipts, too, now, if you have no objection.

Mr. Gallaudet: No objection, counsel.

The Court: I believe they are in evidence now as Defendant's Exhibit A. [73]

The Clerk: I have them for identification, your Honor.

The Court: They may be admitted in evidence now as Defendant's Exhibit A.

Mr. McIntyre: I wonder if counsel would mind if we offered the entire pre-trial statement?

Mr. Gallaudet: Let me look at it.

Mr. McIntyre: I don't think it deviates from the evidence so far before the court.

Mr. Gallaudet: In justice to my client I cannot stipulate that all these facts are true.

Mr. McIntyre: I will withdraw my offer of them then. There is one further fact: Would you be willing to stipulate that Mr. Marwick had not paid the subscription he made, except for the making of this deed?

Mr. Gallaudet: I don't think that is true, counsel. I think he made some payment on account.

(Testimony of George W. Wilson.)

Redirect Examination

Q. By Mr. McIntyre: You were treasurer of the First Presbyterian Church during the year 1927? A. No, sir.

Q. When were you treasurer?

A. 1935 to 1938; three years.

Q. Do you know, from an examination of the church records, whether or not Mr. Marwick paid any cash to the church under that subscription? [74]

A. I have gone through the books all those years and I saw nothing to that effect. I had the books in my charge for three years.

Mr. McIntyre: What information do you have as to his making payment?

Mr. Gallaudet: I have one receipt, counsel, for \$500, and assume there might be others. I can't offer that at the present time, because I can't identify it, but I can't stipulate that he made no payment.

Mr. McIntyre: That, of course, shows a payment of \$500.

Mr. Miller: And also shows there appears to have been other payments.

Mr. McIntyre: My information is that this is an old pledge, made way back. He pledged several times. We have a pledge of \$20,000 which was raised to \$25,000.

The Witness: There were no payments ever made on that \$25,000.

(Testimony of George W. Wilson.)

Q. By Mr. McIntyre: Your examination of the books shows no payment was made on the \$25,000 subscription?

A. It is not on the books to that effect. I don't know anything about the others, because the other pledges I never entered into.

Recross Examination

Q. By Mr. Gallaudet: Can you tell me, Mr. Witness, if you recognize that document as being one which apparently [75] came from the First Presbyterian Church of Santa Barbara?

A. It would seem to indicate it by the fact that it has Mrs. Cash's name on there.

Q. Do you know Mrs. Cash?

A. I do, very well.

Q. Is that her signature?

A. I couldn't say as to that. I don't recall the signature; only I see her at church and I know she is a member of the Church, but I do not know her signature.

Q. Would that document refresh your recollection, or cause you now to state that at least the amount shown thereon was paid on account, or what is your present opinion now, after looking at it?

A. I have no way of knowing what this is about, without seeing it. It states there it is a pledge for \$20,400. That has nothing to do with the pledge of \$25,000, of course. He had made a previous pledge, so far as I know.

(Testimony of George W. Wilson.)

Mr. Gallaudet: We ask that the document may be marked only for identification, if the court please.

Mr. McIntyre: What do you wish to establish by the document? Whether or not \$500 was paid is very immaterial in this matter. If you want a stipulation that he paid \$500 on account of even the \$25,000 pledge, I have no objection.

Mr. Gallaudet: I guess it is not necessary that the document be marked, if the court please.

Mr. McIntyre: We just admitted that he paid \$500 on [76] account of this pledge.

Mr. Gallaudet: I have no further questions of the witness.

The Court: Do I understand counsel are stipulating that \$500 was paid on the pledge made in 1927?

Mr. Gallaudet: Counsel asked me to stipulate, in the first place, that no payments had been made, and we have an impression—that is, counsel for the plaintiff have an impression that perhaps more moneys were paid. Now, we can't prove that, and we don't doubt the integrity of any statements that have been made here, but we just happened to find a document that shows that apparently \$500 was paid, and it is marked: Credit. Balance \$19,-900. If that relates to the pledge of \$25,000 it would indicate considerably more was paid. I do not believe, however, that the document has been sufficiently identified to warrant its being admitted into

(Testimony of George W. Wilson.)

evidence, but I am certainly glad to stipulate that on at least one occasion he paid \$500, and I have no evidence to offer that he paid any more; but I wondered a little bit why the records of the Church, as a matter of fact, are not more accurate.

The Court: Are the Church records, particularly the books of account, available?

Mr. McIntyre: I doubt if the Church has anything that can be properly identified and offered as a book of account. I am informed that the Church has books from 1931 or '32 on, [77] but back of that time they have no adequate record.

The Court: Mr. Wilson, will you take the stand again?

Q. By the Court: You have already told us that you were treasurer of this Church from 1935 to 1938. During the period that you held the office of treasurer did you have, or were you able to locate, the records of the Church, particularly records as to any moneys paid to it by Mr. Marwick during the year 1927?

A. Judge, I couldn't make any statement as to 1937.

Q. 1927?

A. '27, rather—as to moneys that were received there. The books of the Church at that time were not a complete set of accounting until the treasurer, Paul Scott, was made treasurer either in 1931 or 1932, and he served until I became treasurer in 1935, and during all of those years there was a

(Testimony of George W. Wilson.)
complete record of the receipts and disbursements, absolutely 100 per cent, that any auditor could get an audit, because I have had a lot of accounting experience and I know they were in good condition during those years; but previous to that time they were not kept so well. In '37—I went back of this time, and I don't recall even in '27 there was any money received from Mr. Marwick, but this evidently provides there was, and Mrs. Cash was the one who took care of this. I see it appears he evidently paid \$500 at that time.

Q. By Mr. McIntyre: You found no record at all of pay- [78] ments?

A. There were no payments at all during my administration, or during my position as treasurer.

Q. You have found no record of any payments other than what you have seen in court today, of prior payments?

A. That is all I have seen. The records were very incomplete during those years.

The Court: May I inquire whether counsel for the trustee have undertaken to examine such records of the Church as are available?

Mr. Gallaudet: Counsel for the trustee have made no examination, if the court please, of the records of the Church. I might say I personally discussed the matter with Mr. Griffith, who is an attorney, but who is not an attorney of record here, who verified the answer as president of the Board of Trustees, and who called at my office shortly after I filed this action. At that time we tentatively agreed

(Testimony of George W. Wilson.)

to get all of the witnesses together at one time, in the court room of the Referee in Bankruptcy, and have an examination. That never happened.

The Court: Can't you gentlemen look at those books within the next few days, either in Santa Barbara, or in some other place that is convenient, and then come back here and state to the court what the examination thereof discloses as to any payments made by Mr. Marwick?

Mr. McIntyre: I think we can have an auditor go over [79] them, if satisfactory to counsel, and make a report from the books, and reduce what he finds to writing, and send it to the court.

(Discussion.)

The Court: Why can't you gentlemen bring these books down to Los Angeles?

The Witness: Mrs. Wright's cash book would be about all you would want, because all the money goes through that cash book, and immediately is deposited in the bank through a duplicate deposit slip, so we know that all the money that comes into the Church goes through the bank.

(Further discussion.)

Mr. Gallaudet: Counsel, would you expect your record to show any more than the fact that no moneys were received from James Marwick; in other words, do you expect anything more than that?

Mr. McIntyre: No.

Mr. Gallaudet: I will stipulate, then, in the absence of further proof, the presumption is that no further moneys have been paid; that is to say, I know as a matter of law that is true, and therefore will stipulate in the same manner we spoke about today, as a *prima facie* matter, subject to the matter being rebutted, if it appears to be true that no further moneys, except \$500, which we have agreed upon for the purpose of this trial, were paid.

Mr. McIntyre: That is quite satisfactory to me.

[80]

The Court: I have made a notation that the parties stipulate that on the books of the Church no moneys are shown to have been paid by Mr. Marwick except the sum of \$500.

Mr. McIntyre: I wonder, maybe that is a little further than counsel wanted to go. You wanted to have that subject to rebuttal?

Mr. Gallaudet: If no further evidence is offered in regard to it, the court can make that finding from the evidence.

The Court: May we say there will be a short continuance for the purpose of enabling counsel to check this matter?

Mr. Gallaudet: No, as I understand now, the case is concluded, and we do not ask for any further continuance. In other words, we have offered all our evidence.

Mr. McIntyre: With that stipulation we are perfectly content.

The Court: Then both sides rest, so far as the introduction of evidence is concerned?

Mr. McIntyre: There is one matter which has occurred to me: I don't know, but I rather assume you will make no contention that this property is more valuable than the balance due on the pledge. I might state, offhand, that the property is worth somewhere between \$5,000 and \$7,000, and in no event is it worth over \$10,000.

Mr. Gallaudet: I am willing to stipulate, counsel, that [81] it is not worth more than \$10,000; that is, just for the purposes of this trial.

The Court: It is stipulated, then, for the purposes of this trial only, that the property in question is worth not to exceed \$10,000. Will it be claimed that of the estate involved herein, it is worth more than \$10,000, Mr. Gallaudet?

Mr. Gallaudet: No, no such claim will be made, your Honor. [82]

I hereby certify that on Wednesday, June 21, 1939, I was one of the duly appointed, qualified and acting shorthand reporters of the United States District Court for the Southern District of California; that as such I took down in shorthand writing all proceedings and testimony had and given in the cause entitled M. L. Rabbitt, as Trustee in Bankruptcy of the Bankrupt Estate of James Marwick, v. First Presbyterian Church of Santa Barbara, a religious corporation, and James Marwick,

No. 1428-H Equity, on trial before the Honorable Harry A. Hollzer, Judge; that thereafter I caused to be transcribed into typewriting said testimony. And I hereby certify that the foregoing pages, numbered from 1 to 34, both inclusive, are a full, true and complete transcript of the testimony given in said trial on the date hereinbefore set forth.

Dated at Los Angeles, California, this 16th day of January, 1940.

H. A. DEWING

Shorthand Reporter, U. S.
District Court, Southern
District of California.

[Endorsed]: Filed Jan. 18, 1940. [83]

[Endorsed]: No. 9561. United States Circuit Court of Appeals for the Ninth Circuit. First Presbyterian Church of Santa Barbara, California, a religious corporation, Appellant, vs. M. L. Rabbitt, as Trustee in Bankruptcy of the Bankrupt Estate of James Marwick, and James Marwick, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed: June 25, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 9561

M. L. RABBITT, as Trustee in Bankruptcy of the
Bankrupt Estate of James Marwick,
Plaintiff and Respondent,

vs.

JAMES MARWICK,
Defendant,

and FIRST PRESBYTERIAN CHURCH OF
SANTA BARBARA, CALIFORNIA, a re-
ligious corporation,

Defendant and Appellant.

STATEMENT OF POINTS ON APPEAL

Appellant has heretofore filed in the District Court its Statement of Points on Appeal which said Statement of Points on Appeal is contained in the certified record herein. Appellant hereby adopts said Statement of Points on Appeal in this Court and by reference makes said former statement its Statement of Points on Appeal in the above entitled Court.

Dated, June 22, 1940.

SCHAUER, RYON & McMAHON
ROBERT W. McINTYRE

Attorneys for Appellant First
Presbyterian Church of
Santa Barbara, California.

State of California,
County of Santa Barbara—ss.

Mabel Reynolds, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Santa Barbara; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 26 East Carrillo Street, Santa Barbara, California. That on the 22nd day of June, A. D., 1940 affiant served the within Statement of Points on Appeal on the Attorneys for Plaintiff and Respondent, in said action, by placing a true copy thereof in an envelope addressed to said attorneys at the business address of said attorneys, as follows: Sampson H. Miller, Hubert F. Laughren and Edward Gallaudet, c/o Edward Gallaudet, 110 West Broadway, Glendale, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Santa Barbara, California. That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

MABEL REYNOLDS

Subscribed and Sworn to before me this 22nd day of June, 1940.

[Seal] ADA E. SCHOEPF,
Notary Public in and for said County and State.

[Endorsed]: Filed June 25, 1940. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Appellant has heretofore in the United States District Court by designation and stipulation contained in the record certified to this Court, designated the contents of the record upon this appeal. Appellant hereby adopts in this Court its said Designation of Record on Appeal and makes them its designation herein, and in addition thereto as further content of the record on appeal to be printed herein, designates the following documents contained in the record certified to this court:

1. Plaintiff's Exhibit No. 3, a letter from Fred H. Schauer to James Marwick;
2. The Order of the Honorable Albert Lee Stephens, Circuit Judge, extending appellant's time to file transcript on appeal to and including the 25th day of June, 1940;
3. The Stipulation by and between appellant and respondent herein, granting appellant to and including the 25th day of June, [85] 1940, within which to file its transcript on appeal herein, and further stipulating to the contents of the record on appeal, and further stipulating that James Marwick on the trial of the above entitled action withdrew therefrom and disclaimed all interest in the property involved;
4. Stipulation of Fact by and between appellant and respondent herein, dated June 11, 1940, wherein

certain facts not appearing in the transcript are stipulated to.

Dated, June 22, 1940.

SCHAUER, RYON & McMAHON
ROBERT W. McINTYRE

Attorneys for Appellant, First
Presbyterian Church of
Santa Barbara, California.

[86]

State of California,
County of Santa Barbara—ss.

Mabel Reynolds, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Santa Barbara; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 26 East Carrillo Street, Santa Barbara, California. That on the 22nd day of June, A. D., 1940 affiant served the within Designation of Contents of Record on Appeal on the Attorneys for Plaintiff and Respondent in said action, by placing a true copy thereof in an envelope addressed to said attorneys at the business address of said attorneys, as follows: Sampson H. Miller, Hubert L. Laughren and Edward Gallaudet, c/o Edward Gallaudet, 110 West Broadway, Glendale, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Santa Barbara, California. That there is delivery service by United

States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

MABEL REYNOLDS

Subscribed and Sworn to before me this 22nd day of June, 1940.

[Seal] ADA E. SCHOEPPF

Notary Public in and for said County and State.

[Endorsed]: Filed June 25, 1940. Paul P. O'Brien, Clerk.